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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

79-1424

THE CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA,
Petitioner,

VS.

LEGAL AID SOCIETY OF ALAMEDA COUNTY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM OPPOSING CERTIORARI

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STATEMENT OF THE CASE

The Petition for Certiorari should be denied because the case is moot. Even if not moot, the petition should be denied because: (1) the claims are, at best, hypothetical, (2) the claims have not been presented in the proper forum and (3) the District Court's order and Revised Order No. 4 require only equal opportunities, not quotas or preferences.

This is an action against federal officials for failure to enforce the mandates of Revised Order No. 4, 41 C.F.R. § 60-2. The District Court found that the United States Department of Agriculture (USDA) had systematically approved affirmative action programs of federal contractors in Alameda County, California, even though the programs

violated every rudimentary requirement of Revised Order No. 4. For example, programs failed to contain the contractor's statement regarding the minority composition of its workforce, or lacked the contractor's analysis of the actual availability of qualified minorities by pertinent skill levels, or failed to include any statement of good faith goals or other steps to correct identified deficiencies. The District Court's extensive findings regarding the illegality of USDA's approval of these programs are not disputed in the Petition; nor were they disputed by any party on appeal. The sole purpose of the District Court's order was to point out USDA's consistent noncompliance with Revised Order No. 4 and to ensure future compliance with that law in Alameda County.[1]

The sole issue raised by the Petition is whether the District Court's order, on its face, requires minority hiring "quotas" and racial or sexual "preferences". None of the federal contractors in Alameda County who appealed to the Ninth Circuit have joined in this Petition.[2] Nor did any of these federal contractors raise in the Ninth Circuit the issue presented by Petitioner.

Justice Wallace, Browning and Kennedy of the Ninth Circuit unanimously rejected Petitioner's claims and affirmed the District Court's order. 608 F.2d at 1342-44.

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[1]While the Petition questions the legality of Technical Guidance Memorandum No. 1, which is an administrative interpretation of the requirements of Revised Order No. 4, those questions are not appropriate for review in this case since the District Court specified that its order was not based on that Memorandum. 381 F. Supp. at 135-36, n.16. The Court of Appeals agreed. 608 F.2d at 1338.

[2]Federal contractors and the U.S. Chamber of Commerce appealed separately to the Ninth Circuit.

On February 28, 1980, the District Court, upon stipulation by plaintiffs and defendants, dismissed the case. A copy of the Stipulation and Dismissal are appended.

I
MOOTNESS

Since this case has been dismissed by the District Court, there is no present controversy to warrant this Court's review. Assuming, arguendo, that the Court should determine otherwise, the petition should nonetheless be denied for the reasons discussed below.[3]

II
HYPOTHETICAL CLAIMS

The record in this case is entirely devoid of any instance of actual or threatened quota or racial or sexual preference. No employee, applicant or employer has made any such claim. There is not a shred of evidence that any federal contractor has used a quota system or has given preferential treatment to minority or women applicants or employees. Although numerous contractors intervened on appeal, none has claimed that it has been required to use minority preference quotas.[4] Moreover, there is no

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[3]The District Court denied Petitioner intervention in the lower court proceeding involving USDA but granted intervention solely for purposes of appeal. Petitioner did not appeal that denial of intervention and, therefore, has not been a party in the lower court proceedings involving USDA. There has been no active litigation before the District Court in this case for several years. In fact, the USDA is no longer responsible for enforcement of the Executive Order 11246. The U.S. Department of Labor has assumed those responsibilities. Plaintiffs and defendants agreed that no further litigation was necessary and therefore stipulated to dismissal which was signed by the court. If Petitioner wishes to challenge any ongoing enforcement of any requirements by the Department of Labor, it can do so in a separate proceeding.

[4]Revised Order No. 4 applies to both racial minorities and women. For convenience, the term "minority" will be used in this brief to include both.

evidence that responsible federal compliance agencies will construe or enforce the District Court's order or the pertinent regulations so as to require minority quotas or preferences. To the contrary, these agencies administer Revised Order No. 4, as interpreted by the District Court, in a manner that neither requires nor allows any quotas or preferences in the absence of specific findings of discrimination following full administrative hearings.[5]

Following the District Court's order, all of the USDA federal contractors in Alameda County adopted new affirmative action programs in compliance with Revised Order No. 4. 608 F.2d at 1329. Each contractor had an opportunity pursuant to 41 C.F.R. §§ 60-1.28, 1.26, to show cause to USDA why it should not be required to develop and implement a new program, but no contractor contested the requirements through this administrative procedure. Moreover, during the six years since the District Court's order, there has not been a single instance of racial or sexual preference even alleged by contractors, employees or applicants. Petitioner's claims simply have no reality. As the Court of Appeals noted: "[A] hypothetical threat is not enough, *United Public Workers v. Mitchell,* 330 U.S. 75, 90 (1947)." 608 F.2d at 1344.

III
IMPROPER FORUM

Petitioner's claims are not only hypothetical; they have not been presented to the proper forum for review. If any federal contractor had used a minority quota or preference, or believed that USDA was requiring it to do so, administrative and judicial procedures were available for resolving

[5]Brief of Federal appellees before the Ninth Circuit, pp. 20-27.

these issues.[6] Through these procedures the matter may be administratively resolved or a factual record, noticeably absent herein, would have been developed for appropriate review.

IV
EQUAL OPPORTUNITY, NOT QUOTAS OR PREFERENCES

Given the fact that there is no evidence whatever that minority quotas or preferences have been used by federal contractors, or will be required by the responsible federal compliance agencies, Petitioner has the burden to demonstrate in a clear manner that the District Court's order *requires* minority preferences or quotas *on its face.* Indeed, given the presumption of constitutionality and the nondiscrimination requirement of Executive Order 11246, § 202(1), Petitioner must demonstrate that there is no possible construction of the District Court's order that permits any other course of action by federal contractors. Petitioner cannot carry this burden since neither Revised Order No. 4, nor the District Court's order, is capable of any such construction. As the Court of Appeals held:

> Nothing in the decree or inherent in the circumstances of this case requires preferential treatment or discrimination on the basis of race or sex. 608 F.2d at 1343.

The affirmative action requirements of Revised Order No. 4, consistent with Executive Order 11246, are designed

[6]Administrative procedures for resolving complaints of discrimination, including "reverse discrimination" which is prohibited by Executive Order 11246, section 202(1), are contained in 41 C.F.R. §§ 60-1.21-1.24; 60-30. Moreover, for any federal contractor who believes USDA or DOL may be requiring it to adopt an improper affirmative action program, there are extensive administrative provisions for conciliation, opportunities to show cause why such action should not be taken, and opportunities for hearings in the event of alleged noncompliance. Executive Order, § 205; 41 C.F.R. §§ 60-1.21-1.24; 60-30; 60-1.26; 60-1.28.

to ensure that federal contractors provide equal employment opportunities for qualified minorities; they do not create racial preferences. The Executive Order specifically defines affirmative action as a method for achieving nondiscrimination. Section 202(1) requires that federal contractors "take affirmative action to ensure that applicants are employed, without regard to their race, color, religion, sex or national origin." Indeed, the same section prohibits reverse discrimination:

> The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin.

Revised Order No. 4, upon which the District Court based its order, explicitly prohibits the use of "quotas." Section 60-2.12, entitled "Establishment of Goals and Timetables", provides that:

> (e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the affirmative action program work.

Revised Order No. 4 requires that a contractor's good faith efforts be taken into account in the measurement of compliance, as well as in the setting of the goals. A contractor who makes good faith efforts cannot be found in noncompliance even if he fails to achieve his goals:

> No contractor's compliance status shall be judged alone by whether or not it reaches its goals and meets its timetables. Rather, each contractor's compliance posture shall be reviewed and determined by reviewing the contents of its program, the extent of its adherence to this program, and its good faith efforts to make its program work toward the realization of the program's goals within the timetables set for completion. 41 C.F.R. § 60-2.14.

The District Court's order, which was based solely upon Revised Order No. 4, did not, in any manner, modify these good faith safeguards. It would therefore be contrary to the District Court's order for contractors to develop affirmative action programs with quotas or for USDA to enforce affirmative action requirements without consideration of good faith efforts.

Revised Order No. 4, as interpreted by the District Court's order, contains a further safeguard against quotas and racial preferences: the affirmative action programs contain utilization analyses which are the contractor's *own estimation* of the actual availability of qualified minorities and women *in appropriate skill levels.*[7] 41 C.F.R. § 60-2.11(b). To determine whether minorities are underutilized in a job classification, the contractor must consider at least the following eight factors: availability of minorities having the requisite skills; the feasibility of recruitment; the possible results from internal promotions and transfers; the existence of training institutions able to train minorities in the requisite skills; the probable results of training programs the contractor can reasonably undertake; the minority population of the surrounding labor market area; the number of local, unemployed minority workers; and the percentage of the minority workforce compared with the total workforce in the labor market. 41 C.F.R. § 60-2.11(b). Unlike the concept of proportional representation, which is based upon

[7] Underutilization exists, and goals must be established, only when minority employment in a job category is substantially lower than it should be, given the availability of qualified minorities in the relevant labor force. 41 C.F.R. § 60-2.11(b).

crude population statistics, the determination of underutilization is based upon a thorough and well reasoned assessment by the contractor of the actual availability of qualified minority workers by each job category. Thus, Petitioner's contention that underutilization is "predicated upon workforce disparities mirrored by general population percentages without regard to relevent (sic) job skills and their availability in the labor market" is a gross distortion.[8]

The District Court's order did not change the method prescribed by Revised Order No. 4 for determining underutilizations or for setting goals. The Court of Appeals found no inconsistency between the District Court's order and Revised Order No. 4:

> The decree violates neither the language of Revised Order No. 4 nor the administrative province of compliance authorities. 608 F.2d at 1342.

Under the District Court's order, just as under Revised Order No. 4, the federal contractor establishes its own goals on the basis of its own utilization analysis of the availability of qualified minorities and the expected results of its good faith efforts. There is nothing whatever in the District Court's order that requires the setting of inflexible or unrealistic goals. To the contrary, goals must be set at a level which the contractor can realistically achieve. Achievement of the goal is based upon good faith efforts; the contractor is not forced to achieve the goal if qualified minorities are not available. Revised Order No. 4, as interpreted by the District Court's order, is designed to ensure neutrality—to provide minorities with an equal chance—not racial preference.

[8]Petition, p. 2. Similarly, Petitioner is simply *wrong* in its contention that the District Court's order requires "preferential treatment" based on "an arbitrary percentage of such prospective applicants in a general population labor market regardless of skills. . . ." *Id.* at 8.

Federal contractors have numerous ways, under the District Court's order, as well as Revised Order No. 4, to achieve their goals without resorting to racial preferences. These include: (1) eliminating discriminatory selection methods such as invalid tests which have a disproportionate impact upon minorities, (2) eliminating deficient recruitment methods with built-in biases, or (3) undertaking a variety of recruitment steps as noted by the Ninth Circuit. 608 F.2d at 1343. Since these alternatives are available to contractors for achieving their goals, Petitioner cannot reasonably claim that Revised Order No. 4 or the District Court's order requires racial preferences.

CONCLUSION

Petitioners claims have been mooted by dismissal of the case in the District Court. Moreover, since Petitioner's claims are, at best, hypothetical and have not been presented in the proper administrative forum, and there is nothing in the record or intrinsic in the facts of this case that can be construed as a quota or racial preference, the Petition should be denied.

Dated: April 18, 1980.

Respectfully submitted,
STEPHEN E. RONFELDT
STEFAN M. ROSENZWEIG
CLIFFORD SWEET
Attorneys for Respondents

(Appendix follows)

APPENDIX

Appendix

In the United States District Court
For the Northern District of California

Civil Action No. C-73-282 AJZ

Linda Castillo, et al.,
Plaintiffs,

vs.

Ray Marshall, et al.,
Defendants,

National Association for Advancement of Colored People, et al.,
Intervenors.

[Filed Feb. 28, 1980]

STIPULATION AND ORDER OF DISMISSAL

The parties to this action hereby stipulate as follows:

1. The parties have settled all of the issues in this case.

2. Defendants shall, each six months, for a two year period from the date that this stipulation is approved by the Court, provide counsel for plaintiffs with the following information pertaining to Federal nonconstruction contractors in the State of California who are subject to 41 CFR Part 60-2 and who are under the compliance juris-

diction of either OFCCP's San Francisco and/or Oakland area offices:

a. A list containing the names and addresses of all such known contractors who have had on-site reviews during the prior six months;[1]

b. A list containing the names and addresses of all such contractors whose Affirmative Action Programs (AAP's) have been requested for compliance review by either OFCCP's San Francisco and/or Oakland area offices, and which have been approved by OFCCP within the prior six months;

c. A list containing the names and addresses of all such contractors against whom show cause notices have been issued or concerning whom show cause notices have been withdrawn during the prior six months; and

d. A list containing the names and addresses of all such contractors against whom enforcement proceedings have been initiated during the prior six months, and separately, against whom proposed enforcement proceedings are under review. Plaintiffs shall not disclose the name(s) of any contractor on the list against whom proposed enforcement proceedings are under review.

3. The lists defined in paragraphs 2(a)-(d), *supra,* shall be submitted simultaneously, subdivided by area office, and shall be submited to plaintiffs no later than thirty (30) days after the close of the applicable six

[1]It is understood that defendant's normal method of identifying such contractors is by using the EEO-1 form.

month period. The first report under this Stipulation shall be submitted to plaintiffs no later than 30 days after six months from the date that the Court approves the Stipulation.*

4. At each six month interval as defined in paragraph 2, *supra,* plaintiffs' counsel, (i.e., the Legal Aid Society of Alameda County), shall have an opportunity to inspect a sample of no more than 40 files of contractors whose names appear on the list described in paragraph 2(a), said files to include affirmative action programs, ethnic composition workforce reports, compliance review reports, show cause notices, withdrawals of show cause notices (including documents pertaining to such withdrawals), conciliation agreements, and letters of commitment.[2] [This provision is not applicable to cases where administrative or judicial enforcement proceedings are pending or which are under review for possible enforcement proceedings by the Office of the Solicitor, U.S. Department of Labor and/or by the U.S. Department of Justice.]

a. Plaintiffs' counsel shall request access to said files no later than 30 days after receipt of the list in

*In addition, the first report shall include a list containing the names and address of all such known contractors and by contractor shall list current workforce composition by EEO-1 category by race, sex and national origin. Plaintiff's shall not disclose the said workforce statistics or the names of such contractors.

[2]If, in the opinion of OFCCP, disclosure of an outstanding show cause notice would jeopardize conciliation, OFCCP may withhold information on any such contractor until the case is settled or closed. If either of those events occurs, counsel for plaintiffs may obtain the information at that point. In the alternative, counsel for plaintiffs may, (when OFCCP notifies it that such information is being withheld), designate a replacement contractor from the list, *supra.*

2(a), *supra*. Plaintiffs shall arrange to inspect all of such files within 30 days of supplying defendants with their designation of files pursuant to this paragraph No. 4. Access for inspection shall be arranged at mutually convenient times and shall be structured so as to provide minimal disruption to defendants' normal work activities.

5. Nothing in this Stipulation shall prevent plaintiffs from filing other lawsuits against defendants to vindicate asserted rights under Executive Order 11246, as amended, and nothing herein shall prevent defendants from opposing any such suits.

6. Each party shall bear its own costs, fees, and expenses.

Plaintiff Linda Castillo,
et al.
Date 6/1/79
/s/ Stephen E. Runfeldt

Intervenor NAACP, et al
Date 6/11/79
/s/ William Wells (Lyser)

Defendant Ray Marshall,
et al.
Date 6/1/79
Louis G. Finand, Jr.
Date 2/28/80
/s/ Maria P. Rinuror

Assistant United States
Attorney
For G. William Hunter
United States Attorney

ORDER FOR DISMISSAL

Upon consideration of the foregoing Stipulation, which is hereby incorporated into this Order, this case is hereby dismissed.

Ordered this 28 day of February, 1980.

ALFONSO J. ZIRPOLI
United States District Judge